

BOOK REVIEW

***INTERNATIONAL ECONOMIC LAW* BY
ANDREAS LOWENFELD (NEW YORK: OXFORD
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Andreas Lowenfeld, Herbert and Rose Rubin Professor of International Economic Law at New York University School of Law, notes in the acknowledgement page to *International Economic Law* that the editors of Oxford University Press approached him to write a 'treatise on International Economic Law'.¹ This statement is slightly misleading. Although Lowenfeld addresses a great number of areas coming under the general umbrella of international economic law, his work is not an exhaustive treatment of the entire subject. As he notes in the introduction, 'the book is designed not primarily as a work of reference but rather as an integrated whole.'² Indeed, it is doubtful whether any one author possesses the necessary expertise to deal comprehensively with the entire corpus of international economic law, regulating as it does areas as broad-ranging as, for example, goods, intellectual property, sanitary and phytosanitary measures, antidumping and investment.³

While Lowenfeld's book is informed by a sense of optimism as to the Rule of Law's triumph in the economic sphere – recounting that states are relatively more

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¹ Andreas Lowenfeld, *International Economic Law* (2002) viii.

² *Ibid* vii.

³ See J H H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 191: 'it is becoming increasingly difficult (though some still make the claim) to be a true specialist in all areas of substantive law covered by the agreements.'

compliant with international economic norms than other norms of international law⁴ – he chooses not to address the arguably more fundamental challenges to the international economic system – that for increasing numbers (including state parties), the World Trade Organization (‘WTO’) has come to represent the harmful aspects of globalisation and the triumph of the agenda of wealthy nations. One need only look to the failed Ministerial Conferences in Seattle (1999) and Cancun (2003), as well as the ongoing anti-globalisation protests, to grasp the profound importance of this issue. However, it is not Lowenfeld’s (express) intention to convert, apologise or rationalise: he states quite clearly in the preface that ‘this book seeks to teach, not to preach’.⁵ And teach it does.

Running through the entire book is Lowenfeld’s ability to present complex and technical concepts in a form that is concise, elegant and, above all else, interesting. The book bristles with minute historical and legal detail, but at no stage does the content become tedious. Lowenfeld succeeds in placing the reader at the heart of the action, which is not surprising given the author’s long involvement in matters of international economic law, as academic, US State Department lawyer, and frequent arbitrator in international commercial disputes.

International Economic Law is not a traditional ‘black letter law’ reference text; it will only rarely be of assistance in answering the question ‘What is the current law on X?’. Instead, its value lies in demonstrating the *evolution* of international economic law; in tracing the development of regulatory ideas and desires, placing them in their historical and political settings, and presenting the resulting international agreement. It is this sense of history and context that makes Lowenfeld’s book such a worthwhile and useful publication, especially for newcomers to the field.

Turning to the content of the book, the majority of chapters deal with the international law of international trade, with chapters also devoted to the international law of private foreign investment, the international monetary system, and what Lowenfeld describes as ‘Economic Controls for Political Ends’ (ie the use of economic sanctions). The book is divided into eight parts, only a few of which can, due to the constraints of space, be discussed in this review.

Part I, ‘International Economic Law’, provides a brief but illuminating background to the laws of economics relating to international trade and money flows. Lowenfeld provides readers, many of whom will lack a background in economics, with enough information to grasp the underlying context and concepts of international economic law, without delving too deeply into technical detail that often alienates rather than enlightens the uninitiated.

⁴ Lowenfeld, above n 1, v. Further, Lowenfeld twice quotes (at 148 and 196) Louis Henkin’s *How Nations Behave* (2nd ed, 1979) 47: ‘It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’

⁵ Lowenfeld, above n 1, vii. Cf Mitso Matsushita, Thomas Schoenbaum and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2003) cii, in which the authors seek to ‘present a picture of the WTO on its own terms’.

Part II provides a general background to the legal and institutional framework created by the General Agreement on Tariffs and Trade ('GATT') and the WTO and its attendant Agreements. The four chapters in Part II deal with the origins of the GATT (Chapter 3), the Evolution of the GATT and GATT law (Chapter 4), the results of the Uruguay Round of negotiations (Chapter 5), and the General Agreement on Trade in Services (Chapter 6).

Part II begins with an instructive overview of the rationale and content of the GATT. Here Lowenfeld sets the stage for the coming chapters. He starts by presenting the basic and continuing assumptions underlying the GATT: that trade across national frontiers is to be encouraged and government intervention is to be limited.⁶ Lowenfeld then outlines the foundational principles of the GATT, including universal most favoured nation (duties and other charges on imported goods apply equally to all contracting parties), national treatment (non-discrimination against imported goods), the commitment not to increase trade barriers, and the acceptance of tariffs as the only legitimate trade restraint. Recognising that these principles are often not determinative of outcomes, Lowenfeld also undertakes a brief analysis of their qualifications, including national security, the regime of general exceptions, and custom unions and free trade areas.

Lowenfeld then tracks the progress of trade negotiations through the Kennedy and Tokyo Rounds to the Uruguay Round. Lowenfeld does not downplay the importance of the Uruguay Round in broadening the scope of the rules and institutions of international trade law, and rightly so. He states:

In some ways the conclusion of the Uruguay Round and the establishment of the World Trade Organization constitute a new start for the international law of international trade.⁷

However, faithful to his evolutionary approach to international economic law, Lowenfeld continues:

But there is no doubt that the WTO is a continuation of the GATT system, a ratification and formalization of close to fifty years of development of rules of an institution – written and customary – and of attitudes of the participating states.⁸

The reader is then presented with an insightful analysis of the achievements of the Uruguay Round. Some agreements, such as the Anti-Dumping Code and the Agreement on Subsidies and Countervailing Measures, are given brief treatment, to be expanded upon later in the book. Other important agreements, such as the Agreement on Safeguards and the Trade-Related Aspects of Intellectual Property

⁶ Lowenfeld, above n 1, 23.

⁷ Ibid 69.

⁸ Ibid 69.

Rights ('TRIPs') Agreement, are examined only briefly (and do not surface again in any meaningful way). This is especially disappointing in the case of the TRIPs Agreement. The TRIPs Agreement, probably more than any other trade agreement, demands sweeping changes and, in some cases, additions to domestic laws and regulations,⁹ and has been the subject of persistent criticism on the basis of its alleged inimical effects on the economic and social interests of developing countries.¹⁰ Unfortunately, Lowenfeld devotes little time to these issues, merely noting them, and concludes in typical cutting style:

An unspoken element of the "package deal" that became the Uruguay Round was that greater access for goods of the developing countries in developed country markets must be accompanied by greater protection of intellectual property in the developing countries.¹¹

Part III, 'Dispute Resolution', covers dispute resolution in the GATT (1948-1994) and, subsequently, in the WTO. Lowenfeld traces the movement from diplomatic settlement of trade disputes under the GATT to a focus on 'judicialisation' and adjudication under the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'). He concludes that when the members of the WTO adopted the DSU, they 'committed themselves to a system in which the rights and obligations were to be matched by an equally comprehensive system of remedies.'¹²

Seeping ominously through his treatment of dispute settlement under the WTO is the 'section 301 remedy', a section (or, more accurately, a number of sections) of US trade legislation that permit unilateral retaliation on the part of the US Government for perceived breaches of international trade rules. Clearly, a reversion to unilateral retaliation will undermine the compulsory dispute settlement procedures established in the DSU. After a concise and illuminating exposition of the operation of section 301 remedies, Lowenfeld argues persuasively that the DSU has been successful in inducing state parties – most notably the US – to move from a unilateral to multilateral approach to the resolution of trade disputes. In support of this thesis Lowenfeld draws on the *Kodak-Fuji* case between the US and Japan, which saw the US resort to the DSU almost immediately following its introduction.¹³

In order to present 'a realistic appraisal of the WTO dispute settlement system',¹⁴ Lowenfeld also turns to the long-running dispute between the US and the EU over EU subsidies to banana growers, which saw the US perilously close to reverting to

⁹ See Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed, 1999) 330.

¹⁰ See Office of the High Commissioner for Human Rights, *Human Rights and Trade* (Paper for the 5th WTO Ministerial Conference, Cancun, Mexico, September 10-14, 2003) 7-9.

¹¹ Lowenfeld, above n 1, 99-100.

¹² *Ibid* 150.

¹³ *Japan—Measures Affecting Consumer Photographic Film and Paper (United States v Japan)*, Panel Report WT/DS44/R (22 April 1998).

¹⁴ Lowenfeld, above n 1, 196.

unilateral trade measures. Here Lowenfeld again displays his gift for presenting factually and legally complex issues clearly and elegantly. For Lowenfeld, whatever does not kill the DSU makes it stronger, and the fact that unilateralism in the bananas dispute was avoided is testimony to the substantial contribution made by the DSU to the compliance framework of international economic obligations.

Part IV, 'The Rules of International Trade in Detail', is the closest this book gets to a traditional reference work. Lowenfeld deals in detail with the regulation of subsidies and countervailing measures (chapter 9) and dumping and anti-dumping (chapter 10). Part V, 'Beyond the World Trade Organization', deals with two 'trade and ...' issues: trade and the environment (chapter 11) and trade and competition law (chapter 12¹⁵). Both are extremely comprehensive chapters, highlighted by Lowenfeld's masterly yet concise analysis of the *Tuna/Dolphin* and *Shrimp/Turtle* cases, both of which run to hundreds of pages in the reports.

The greatest contribution of the book (in this author's opinion), and the last to be discussed in this review, comes in Part VI, 'International Investment'. Here, Lowenfeld takes a central theme – the responsibility of host states to foreign investors – and examines its position at customary international law, its treatment in domestic and international courts and tribunals, and the impact of case- and regional-specific agreements.

The underlying principles governing the international law of international investment are that aliens are entitled to at least equality of treatment with nationals of the host state, and that a state is obliged to pay compensation in the event of an expropriation of property belonging to an alien. It is primarily the customary international law of state responsibility for expropriations that regulates the treatment of international investment, and it is in this area that Lowenfeld seems most at home. His analysis begins with a brief statement of the law prior to World War I, then considers the breakdown of principles of state responsibility during the Russian and Mexican revolutions, moves through the 'classical Western view' that urges compensation upon expropriation to be 'adequate, effective and prompt', notes the undermining of these principles during the massive wave of expropriations between 1945 and 1970, and rounds out the analysis with a thoughtful summary of the contributions made by contemporary international tribunals.

In the final chapter on international investment, 'Evolving Standards of International Law on International Investment', Lowenfeld considers the 'new devices' regulating international investment, including bilateral investment treaties, investment guarantees and the ICSID dispute settlement facility. The emerging significance of these 'new devices' cannot be underestimated. Two obvious reasons come to mind. First, since the failure of the Cancun Ministerial, the US has vowed to move ahead in the direction of bilateral and regional trade agreements, and the EU

¹⁵ Chapter 12 is contributed by Lowenfeld's New York University colleague, Professor Eleanor Fox.

has also considered giving greater priority to such arrangements.¹⁶ In the Asian-Pacific region alone, Australia has recently signed bilateral agreements with Singapore, Thailand and the US, is negotiating with China and Malaysia, and agreements are now being developed in Asia to link Japan, South Korea and China and the ASEAN economies in various combinations.

Second, investor protection provisions in all bilateral investment treaties, and many free trade agreements, provide investors with an automatic arbitral forum for the settlement of investment disputes with host states (without relying, as is traditionally the case in international law, for a home state to adopt the investor's claim). The provision of investor-state arbitration has aroused much sentiment, especially in the context of the North American Free Trade Agreement, where it has been described on the one hand as a 'most innovative feature', and, on the other, as a 'fast track attack on American values', an 'end-run around the Constitution' and as 'shockingly unsuited to the task of balancing private rights against public goods'.¹⁷

Lowenfeld does not enter the fray. Instead he presents the main provisions common to most investment agreements: obligations surrounding the admission of foreign investment; fair and equitable treatment; full protection and security; and compensation in the case of expropriation. Lowenfeld helpfully examines the case law dealing with the concept of expropriation, the difference between expropriation and the mere exercise of regulatory or police powers, and the vexing issue of the amount of compensation due following an expropriation. Given the current fragmented state of the law,¹⁸ it is understandable that Lowenfeld does not reach any firm conclusions on these questions, although his guidance and analysis of the jurisprudence is invaluable. However, in one of the book's highlights, Lowenfeld outlines a fairly convincing case for bilateral investment treaties having reached the status of customary international law. He writes:

a fair inference might be drawn that, taken together, the Bilateral Investment Treaties are now evidence of customary international law, applicable even when a given situation or controversy is not explicitly governed by a treaty.¹⁹

Lowenfeld states his (controversial) case tentatively, finishing with the remark that 'the debate need not be answered conclusively'.²⁰ In a subsequent and wonderfully provocative article, however, Lowenfeld is more forthright, suggesting

¹⁶ See Jurgen Kurtz, 'Developing Countries and Their Engagement in the World Trade Organization: An Assessment of the Cancun Ministerial' (2004) 5 *Melbourne Journal of International Law* 280, 294-296.

¹⁷ See Guillermo Aguilar Alvarez and William Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 *Yale Journal of International Law* 365, 383-387.

¹⁸ See further Norah Gallagher and Laurence Shore, 'Bilateral Investment Treaties: Options and Drawbacks' [2004] *International Arbitration Law Review* 49, 51: 'An investor looking for definitive advice on whether certain acts taken by a host state amount to expropriation requiring compensation may be disappointed.'

¹⁹ Lowenfeld, above n 1, 486.

²⁰ *Ibid* 487.

that the mass of almost identical bilateral investment treaties constitutes international legislation, though it does not quite fit the traditional classification of international law into two categories – customary law and treaty law.²¹

Lowenfeld continues persuasively that

the BIT movement has moved beyond *lex specialis* (or better, *leges specialis*) to the level of customary law effective even for non-signatories. This conclusion may be inconsistent with the traditional definition of customary law ... My suggestion is that perhaps the traditional definition of customary law is wrong, or at least in this area, incomplete.²²

International Economic Law is a valuable book. Its strength lies in its ability to present complicated and dense political, historical and legal detail in an informative and easily digestible form. Lowenfeld notes in the 'Afterword' that he has chosen not to approach the subject normatively, but rather to emphasise the *process* of international economic law, believing that 'the answers cannot be understood without the questions'. This lack of 'black letter' content may, however, prevent the book from reaching the reading lists of law school classes. This would be a shame. For Lowenfeld's book belongs, to borrow a phrase, in the 'innermost circle of books',²³ in addition to conveying its message it is a pleasure to read.

²¹ Andreas Lowenfeld, 'Investment Agreements and International Law' (2003) 42 *Columbia Journal of Transnational Law* 123, 128.

²² *Ibid* 129-130.

²³ See Petros Mavroidis, 'Lexcalibur: The House That Joe Built' (2000) 38 *Columbia Journal of Transnational Law* 669, 669.